enacting section 274, to require that they be provided in a duplicative or ineffective manner.

V. MARKETING PROVISIONS (NPRM ¶¶ 49-63)

A. Permissible Marketing Activities By A Separated Affiliate; Restrictions on BOC (NPRM ¶ 53)

The Commission seeks comment on the meaning and scope of the joint marketing provisions of section 274(c) (NPRM ¶ 53). The section states that "*a Bell operating company* shall not carry out any promotion, marketing, sales, or advertising for or in conjunction with a[n electronic publishing] separated affiliate."[19] It is plain that Congress intended that these provisions apply only to activities undertaken by a BOC. The statute contains no prohibition on the electronic publishing separated affiliate's joint marketing any BOC or affiliate service. If Congress had intended to restrict the activities of the separated affiliate, it would have done so specifically. Consequently, the statute imposes no restrictions on the electronic publishing separated affiliate's ability to market and sell BOC services or those of any other affiliate or unrelated third party.

The plain meaning of the statute clearly contemplates that an electronic publishing separated affiliate should be able to sell its services (and the services of other affiliates and unrelated third parties) with a BOC's local exchange and other telecommunications services. This reading is also consistent with the goal to provide consumers with "one-stop

[19] Section 274(c)(1) (emphasis supplied).

shopping," which the Commission recognizes as a benefit to consumers.[20] Further, imposing restrictions on sales and marketing activities of the electronic publishing separated affiliate, restrictions which would not apply to its competitors (who would be free to purchase and resell BOC services along with their own electronic publishing services, or act as BOC sales agents), would put the BOC separated affiliates at an unfair competitive disadvantage, thus hampering rather than fostering competition in this market.[21]

B. Relationship to Joint Marketing Restrictions of Section 272 (NPRM ¶ 53)

The Commission also seeks comment on whether and to what extent the joint marketing provisions in section 272(g) affect the implementation of section 274 (NPRM ¶ 53). The marketing provisions of section 272 and section 274 apply to the provision of different BOC affiliate services and therefore any rules issued interpreting one section should not necessarily be deemed to apply to the other. In no event, should the joint marketing and sales restrictions contained in section 274 apply to the services and facilities provided under section 272.

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[20]As noted in the NPRM, the provision by the BOCs of new services "offers the prospect of fostering vigorous competition among providers of such services, because of the unique assets that the BOCs possess. BOCs can offer a widely recognized brand name that is associated with telecommunications services, *the benefits of "one-stop shopping,"* and other advantages of vertical integration" NPRM at ¶ 6 (emphasis added).

[21]The Commission recognizes that "[t]he provision by BOCs of .... [electronic publishing] offers the prospect of fostering vigorous competition among providers of such services . . ." (NPRM ¶ 6).

C. Inbound Telemarketing (NPRM ¶¶ 54-55)

As noted by the Commission, under section 274(c)(2)(A), a BOC may provide inbound telemarketing or referral services related to the provision of electronic publishing for a separated affiliate, electronic publishing joint venture, affiliate, or unaffiliated electronic publisher (NPRM ¶ 54). Section 274 defines "inbound telemarketing" as "the marketing of property, goods, or services by telephone to a customer or potential customer who initiated the call."[22] Congress did not restrict the inbound telemarketing services a BOC may provide to a separated affiliate in any way, except to require the BOC to make such services available to all electronic publishers "on request, on nondiscriminatory terms."[23]

Consequently, the statute should be interpreted to permit a BOC to engage in any of the following inbound telemarketing activities on a nondiscriminatory basis as between its affiliates and unrelated parties: handle, as agent for the separated affiliate providing the electronic publishing services, incoming telephone calls from customers or potential customers requesting products or services; use a toll free number provided by the separated affiliate for use by customers or potential customers of the separated affiliate; respond to the incoming calls using the separated affiliate's name and, to the extent possible, a script approved in advance by the separated affiliate; answer customer questions, provide information and take orders for products or services using data and procedures provided by or approved by the separated affiliate; process orders for

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[22] Section 274(i)(7).

[23] Section 274(c)(2)(A).

fulfillment by the separated affiliate by completing an order form containing information about the product or service ordered (including customer address and other relevant information, and method of payment) and forwarding this form to the separated affiliate using any of a number of means, including fax or on-line transmission. This means that a BOC would only provide the foregoing services to its separated affiliate if it made the same services available to unrelated parties on comparable terms and conditions.

There is no statutory authority for the Commission to impose restrictions on the types of inbound telemarketing services a BOC may provide to its separated affiliates relating to electronic publishing, as long as the BOC provides such services on a nondiscriminatory basis. Restrictions on these activities beyond those specifically imposed by the statute would frustrate Congressional intent to secure for consumers the benefits of one-stop shopping and the efficient and economical delivery of new telecommunications services.

D. Teaming Arrangements (NPRM ¶¶ 56, 57)

In addition to joint telemarketing activities permitted by section 274(c)(2)(A), a BOC is permitted by the 1996 Act to engage in "teaming" or "business arrangements" to provide electronic publishing under certain conditions.[24] Section 274(c)(2)(B) states that "a [BOC] may engage in nondiscriminatory teaming or business arrangements to engage in electronic publishing with any separated affiliate or with any other electronic publisher if

[24] Section 274(c)(2)(B).

(i) the [BOC] only provides facilities, services, and basic telephone service information as authorized by this section, and (ii) the [BOC] does not own such teaming or business arrangement." The Commission seeks comment on what types of arrangements are encompassed by these terms (NPRM ¶ 56).

The plain meaning of Section 274(c)(2)(B) indicates that Congress intended teaming, in its broadest form, to be a joint marketing activity available to a BOC and its separated affiliates. With the exception of the specific nondiscrimination and other requirements of section 274(c)(2)(B), Congress put no limits on the broad range of activities which reasonably fall within the definition of teaming.[25] A BOC and its separated affiliate should therefore be permitted to engage in the following teaming activities: provide to a customer, and contract separately with that customer for, regulated telephone service and electronic publishing services, respectively; make joint sales calls through premises visits or telemarketing, and plan for such sales calls; supply potential customers with copies of sales literature describing each entity's products and

[25] "Teaming" arrangements were recognized under the MFJ as a legally permissible way for the BOCs and unaffiliated telecommunications suppliers to meet customer needs by offering their respective telecommunications services in a complementary or coordinated manner to customers. BOCs would "team" with telecommunications companies that would provide services that the BOCs were prohibited from providing under the MFJ. For example, in 1986, the DOJ concluded that BellSouth could team with SouthNet, an unaffiliated company, to provide Shared Tenant Service arrangements to customers. BellSouth, through a subsidiary, provided customer premises equipment for telecommunications to the tenants in buildings. SouthNet separately agreed with the tenant to provide interexchange telecommunications service. In approving this arrangement, the DOJ noted that the contractual arrangements of the customer were separate and distinct as between BellSouth and SouthNet. It concluded that BellSouth's participation in this teaming arrangement did not violate section II(D) of the MFJ. See Letter from Kevin R. Sullivan to Victor J. Toth, Esq., dated June 12, 1986. See also, Response of the United States to Ameritech's Motion for Clarification and Waiver of the Decree Regarding the provision of Shared Telecommunications and Other Services, filed on June 29, 1984 (p. 10, fn. 8), in which the DOJ stated: ". . . there are a variety of ways, including 'teaming arrangements,' for example, by which [a Regional Holding Company] may participate in the provision of shared services arrangements by providing permitted products and services which comprise elements of such arrangements."

services which are the subject of the teaming arrangement; advertise and promote the availability of the products and services offered through the teaming arrangement (as long as the advertising makes clear that the products are separately provided); and coordinate installation of services.[26]

As noted above, permitting the BOC to enter into teaming arrangements with its electronic publishing affiliate reflects Congress's goal of providing consumers with another form of "one-stop shopping" for telecommunications and related services. In addition, these arrangements will allow BOCs and their separated affiliates to provide customers with the efficiencies that coordinated arrangements can provide. Teaming arrangements such as those described above, because they must be nondiscriminatory, and because the BOC and the separated affiliate would contract separately with the customer, present minimal risk of potential anticompetitive behavior.

VI. NONDISCRIMINATION SAFEGUARDS (NPRM ¶¶ 64-67)

The Commission seeks comment on whether and to what extent regulations are necessary to implement the nondiscrimination safeguards set forth in section 274(d) (NPRM ¶ 64). The Commission notes that prior to the 1996 Act, electronic publishing services were subject to the nondiscrimination requirements of Computer II, Computer III, and Open Network Architecture ("ONA"). The Commission tentatively concludes that the requirements of CI-II, CI-III, and ONA should continue to apply to the extent they are not inconsistent with the 1996 Act (NPRM ¶ 65). In addition, the NPRM generally

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[26] See note 25, supra.

asks to what extent the existing CI-II, CI-III, and ONA requirements are inconsistent with the 1996 Act (NPRM ¶¶ 65,66).

NYNEX respectfully urges that the Commission reconsider its tentative conclusions. Congress specifically addressed the terms and conditions under which BOCs should offer new or competitive services, and where appropriate provided for structural and non-structural safeguards. Another layer of safeguards or conditions would frustrate Congressional intent to eliminate excessive regulatory barriers to entry by the BOCs into new telecommunications markets, thereby undermining the BOCs ability to pass on to consumers lower prices that result from operational efficiencies and economies of scope.

A. Applicability of CI-II, CI-III and ONA Requirements for BOC Electronic Publishing Services Offered Under Section 274

The Commission found that CI-II structural separation was one way to serve the goal of preventing anticompetitive conduct of a BOC relative to its provision of enhanced services. Although the interpretation of section 274 is a matter under review in this proceeding, it is clear that it affords protections that are equal to or greater than those specified in the Commission's CI-II separate subsidiary safeguards, thereby rendering such safeguards redundant. Therefore, the Commission should find that BOC electronic publishing services that are offered through a section 274 affiliate more than satisfy all relevant requirements. Clearly, CI-II, CI-III and ONA rules no longer have any independent relevance. NYNEX has addressed the applicability of any necessary accounting safeguards in comments filed in CC Docket 96-150.

VII. ALARM MONITORING (NPRM ¶¶ 68-74)

Section 275(e) defines "alarm monitoring service" as

> "a service that uses a device located at a residence, place of business, or other fixed premises --
>
> (1) to receive signals from other devices located at or about such premises regarding a possible threat at such premises to life, safety, or property, from burglary, fire, vandalism, bodily injury, or other emergency, and
>
> (2) to transmit a signal regarding such threat by means of transmission facilities of a local exchange carrier or one of its affiliates to a remote monitoring center to alert a person of such threat, but does not include a service that uses a medical monitoring device attached to an individual for the automatic surveillance of an ongoing medical condition."

In the NPRM, the Commission seeks to define more clearly the services that are included in the definition of alarm monitoring, and tentatively concludes that the provision of underlying basic tariffed telecommunications services alone, without an enhanced or information component, does not fall within the definition of "alarm monitoring service" under section 275(e) (NPRM ¶ 69). NYNEX agrees with that conclusion. Further, NYNEX urges the Commission not to accept or adopt any proposed expansions of the definition of "alarm monitoring service" or any interpretation that does not include each and every component listed in section 275(e).

VIII. TELEMESSAGING (NPRM ¶¶ 75, 77)

A. Scope of Section 260; Relationship to Section 272

Section 260 sets forth various requirements for the provision of telemessaging service by LECs subject to the requirements of section 251(c). The Commission seeks comment on whether section 260 applies to the BOC provision of intraLATA and

interLATA telemessaging (NPRM ¶ 75). Like section 274, section 260 makes no distinction between intraLATA and interLATA service. As discussed above in Section II of these Comments, when Congress intended that a provision apply to only interLATA or intraLATA service, it so stated specifically, as it did in applying section 272 requirements to interLATA, but not intraLATA, information services. See section 272(a)(2)(C). Therefore, both intraLATA and interLATA telemessaging services should be subject to section 260 requirements. NYNEX agrees with the Commission's tentative conclusion in the In-Region NPRM that telemessaging is an information service, and if provided on an interLATA basis, is subject to the requirements of section 272 in addition to the requirements of section 260 (In-Region NPRM ¶ 54).

B. Requirements for A Telemessaging Service to Be An InterLATA Information Service

As noted above, a BOC providing an interLATA telemessaging service is subject to the requirements of section 272. A telemessaging service should be considered an interLATA service, however, only if the BOC provides interLATA transport as part of the service. In the In-Region NPRM, the Commission asked parties to comment on whether an information service, such as voicemail, should be considered an interLATA service only when the service actually involves an interLATA telecommunications transmission component. Alternatively, the Commission suggests that the service be classified as interLATA if it potentially involves an interLATA telecommunications transmission component, for example if the service can be accessed across LATA boundaries.

NYNEX disagrees that an information service, such as telemessaging, should be classified as interLATA on the basis that it can be accessed across LATA boundaries. The 1996 Act specifies in section 272(a)(1) that a "Bell operating company (including any affiliate) ... not provide [interLATA information services] unless it provides that service through one or more [separate] affiliates ..." (emphasis added). Since the 1996 Act defines "interLATA service" as "telecommunications between a point located in a [LATA] and a point located outside such [LATA]" (see section 3(a)(20(42)), it follows that a BOC may "provide" an "interLATA information service" (or any other kind of "interLATA service") only if the BOC "provides" "telecommunications" (defined to mean "transmission") (see section 3(a)(2)(48)) between a point located in one LATA and a point outside that LATA.

Thus, the 1996 Act itself makes clear that unless a BOC (or affiliate) itself provides interLATA "telecommunications" (defined as "transmission"), no separate affiliate is required. There is absolutely no basis for the suggestion in the In-Region NPRM that a service may be considered interLATA merely because it could be or is accessed from a different LATA. By that logic, BOC provision of exchange access service would involve a prohibited interLATA telecommunications service.

Moreover, the separate affiliate requirement applies to information services only if an interLATA service is provided as a component of the information service. In cases where interLATA and information services are separately provided, the information service and the interLATA service should be treated as independent transactions -- which is exactly what they are. A customer's use of an information service and an independently

provided interLATA service does not convert that information service into an interLATA information service. The result should not differ if the interLATA service is provided by a separate affiliate of a BOC rather than a third-party interLATA communications company.

The term "provide interexchange telecommunications services" has a long history under the MFJ, which prohibited the BOCs from providing interexchange telecommunications services.[27] Although the term was interpreted somewhat broadly by the MFJ Court, it was never interpreted so broadly as to encompass provision of an information service (without transmission) that was accessed on an interLATA basis by means independently chosen by the customer. Thus, for example, in the MFJ "gateway" decision (In-Region NPRM ¶ 45, n. 87), the decisive fact that led the Court to conclude that the Bell Atlantic proposal would impermissibly involve provision of interexchange services was that Bell Atlantic provided interLATA transport between the customer and the computer(s), not that information was stored in a computer and made available to customers (an information service).[28]

In summary, the 1996 Act, the MFJ and the common sense meaning of the term "provide" all make it clear that for a BOC to "provide" an "interLATA [information] service," such as telemessaging, that BOC, and not some third party, must provide interLATA "telecommunications."

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[27]The MFJ stated in section II (D) that "no BOC shall . . provide interexchange telecommunications services. . . ."

[28] See United States v. Western Electric Co., 1989-1 Trade Cas. ¶ 68,400 at 60 (D.C.C. 1989), aff'd. 907 F.2d at 160 (D.D. Cir. 1990).

IX. ENFORCEMENT ISSUES (NPRM ¶¶ 78-84)

Section 274(e) provides a private right of action to any person claiming that a BOC, affiliate, or separated affiliate has violated section 274. Such person may file a complaint with the Commission or bring suit as provided in section 207.[29] The Commission seeks comment on the legal and evidentiary standards necessary to establish that a BOC has violated section 274 and, as it did in the In-Region NPRM for purposes of complaints arising under section 271(d)(6)(B), proposes to shift the burden of proof from the complainant to the BOC once the complainant makes a prima facie showing that a BOC has violated section 274 (NPRM ¶ 79). The Commission also seeks comment on what acts or omissions are sufficient to state a prima facie case for relief under section 274 (NPRM ¶ 79). The arguments made below are more fully discussed in NYNEX's Comments filed in CC Docket 96-149. See NYNEX Comments, pp. 62-76.

The Commission's proposal to shift the burden of proof would constitute a serious denial of due process, and in any event, is unnecessary to carry out the purposes of the 1996 Act. Simply permitting a complainant to allege facts that, if true, are sufficient to constitute a violation of the 1996 Act, without defining and requiring the submission of "proper supporting evidence" in the complaint, would both violate a defendant's procedural rights and invite a flood of nuisance filings.

It is important for the Commission to establish detailed requirements for the filing of a complaint. Respondents cannot meaningfully answer claims until the nature of the allegations and their factual predicate is fully known. In addition, a competitor has a

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[29] Section 274(e)(1).

financial incentive to allege violations of section 274. In the face of the potential benefits to a complainant, the possibility of sanctions for frivolous complaints may be insufficient to deter unsubstantiated claims, particularly if the burden of proof is shifted to the respondent as proposed by the Commission. Further, sanctions are seldom applied in litigation, in part because of the difficulty of proving that the conduct at issue is so egregious that sanctions are warranted. Adoption of a clear filing standard is therefore congruent with, and, indeed, essential to, forestalling (and sanctioning) frivolous filings.

For these reasons, NYNEX proposes that, to make out a prima facie case, the complaint must:

- contain a description of the complainant and its interest;
- be sworn and notarized and enumerate the facts on which the complaint is based, differentiating between statements of personal knowledge and statements based on information and belief;
- provide a verifiable source of statements based on information and belief;
- contain a clear and concise recitation of the facts which demonstrate a failure to comply with a specific requirement of section 274;
- be accompanied by any documentation supporting the facts alleged which is available, or can reasonably be obtained; and
- identify any materials which the complainant has been unable to obtain after due inquiry which it asserts is in the BOC's or separated affiliate's possession.

If the complaint is deficient in any of the respects listed above, the FCC should notify the complainant that it is incomplete.[30]

[30] Reviewing a complaint for completeness is consistent with the FCC's February 9, 1996 Public Notice, in which the FCC stated its intention to discourage the filing of frivolous pleadings generally.

If a complainant has submitted prima facie evidence of a violation, the BOC should be required to provide a sworn and notarized response, which should contain:

- an admission or denial of all allegations contained in the complaint;
- a summary of the facts on which the BOC response is based, differentiating between statements of personal knowledge and statements based on information and belief;
- a verifiable source of statements based on information and belief;
- any defense alleged to justify the conduct complained of; and
- documentation supporting the facts asserted in defense if such documents are available or can be reasonably acquired by the BOC within the time allowed for its response.

NYNEX submits that the process described above assures that relevant information will be disclosed early in the process, making it unnecessary for the Commission to take the extraordinary action of shifting the burden of proof. For the reasons discussed above, the Commission should not adopt its proposal to shift the burden of proof of violations of section 274 to the defendant BOC.

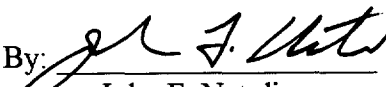
X. CONCLUSION

In this proceeding the Commission seeks to implement rules for the BOC provision of electronic publishing, telemessaging and alarm monitoring services in accordance with the new nationwide telecommunications policy to opening *all telecommunications markets to competition*. The Commission has acknowledged in the NPRM that in promulgating these rules, it should develop a pro-consumer, deregulatory policy framework, in a manner consistent with Congressional intent, which accomplishes the following goals:

(a) promote rapid acceleration of advanced telecommunications and information technologies to all Americans by opening all telecommunications markets to competition; (b) provide for BOC entry into new telecommunications markets in a manner which allows the BOCs to use their economies of scope, advantages of vertical integration, and other unique assets (e.g., widely recognized brand name, the ability to offer one-stop shopping) to the benefit of consumers; and (c) adopt rules to prevent potential anticompetitive behavior by the BOCs without depriving the BOCs of legitimate competitive advantages that can benefit consumers. (See NPRM ¶¶ 5, 6, 8). NYNEX's comments in this proceeding propose an interpretation of the 1996 Act that is consistent with the attainment of these goals, and we therefore urge the Commission to adopt NYNEX's comments and recommendations.

Respectfully submitted,

NYNEX Corporation

By: 
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